



STATE OF HAWAII
DEPARTMENT OF EDUCATION
P.O. BOX 2360
HONOLULU, HAWAII 96804

Date: 02/22/2022

Time: 10:00 AM

Location: CR 211 & Videoconference

Committee: Senate Ways and Means

Department: Education

Person Testifying: Keith T. Hayashi, Interim Superintendent of Education

Title of Bill: SB 2335, SD1 RELATING TO PROCUREMENT.

Purpose of Bill: Allows purchasing agencies to use the median bid method of procurement. (SD1)

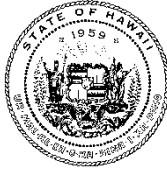
Department's Position:

The Hawaii State Department of Education (Department) supports SB2335, SD1. This bill removes the gamesmanship in low bid construction procurement and encourages contractors to submit fair and reasonable pricing due to the selection of the median bid.

For past Department construction contracts, the low bid process resulted in an average of 11% in contract change orders. Unscrupulous contractors lowball the winning bid then subsequently submit a series of change orders during the course of construction. The Department had 3,407 construction contracts that resulted in \$1.742 billion in contract bid price end up in \$185 million in change orders, representing an 11% average of contract price in change orders.

Currently, the Department has 175 construction contracts totaling \$673 million. An average of 11% in change orders represents an additional \$74 million in cost increase to complete construction.

Thank you for the opportunity to provide testimony in support of this measure.



**STATE OF HAWAII
STATE PROCUREMENT OFFICE**

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**TESTIMONY
OF
BONNIE KAHAKUI, ACTING ADMINISTRATOR
STATE PROCUREMENT OFFICE**

**TO THE SENATE COMMITTEE
ON
WAYS AND MEANS
FEBRUARY 22, 2022, 10:00 AM**

**SENATE BILL 2335, SD1
RELATING TO PROCUREMENT**

Chair Dela Cruz, Vice Chair Keith-Agaran, and members of the committee, thank you for the opportunity to submit testimony on Senate Bill 2335, SD1. The State Procurement Office (SPO) opposes the bill in its entirety and provides the following comments.

SB2335, SD1 proposes to add a new section to part III of Chapter 103D, Hawaii Revised Statutes called **"§103D - Competitive sealed bidding; median bid method."**

The language proposed in SB2335, SD1 is almost identical to §103D-302, Hawaii Revised Statutes (HRS), which already addresses the competitive sealed bidding process. The only difference is in the reference to the award to "bidder whose bid is closest to the median of all bids submitted". The SPO does not see any additional value to awarding a contract to the bid closest to the median of all bids submitted when another bid may be lower, responsive, and responsible. Additionally, SB2335, SD1 does not offer any explanation when it is appropriate to accept the "bidder with bid closest to the median of all bids submitted". When only two bids are submitted, how is the "median" bid determined? The phrase "closest to the median of all bids submitted" needs to be defined and provide clarity. This phrase can easily be misconstrued and likely lead to more protests. Additionally, vendors will not have the incentive to submit their best offers, but instead vendors will be encouraged to submit higher prices.

The Hawaii Public Procurement Code is the single source of public procurement policy to be applied equally and uniformly while providing fairness, open competition, a level playing field, government disclosure, and transparency in the procurement and contracting process vital to good government.

Competitive sealed bidding's primary objective is that the contract shall be awarded with reasonable promptness by written notice to the ***lowest, responsible, and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids.*** It is also a best practice that bids are evaluated for responsiveness solely on the material requirements set forth in the solicitation and must meet all of those requirements unconditionally at the time of bid opening, and no criteria may be used in bid evaluation that is not set forth in the solicitation.

“Responsible bidder or offeror” means a person who has the capability in all respects to perform fully the contract requirements, and the integrity and reliability that will assure good faith performance, pursuant to the responsibility determination standards adopted by the policy board.

“Responsive bidder” means a person who has submitted a bid which conforms in all material respects to the invitation for bids.

The State of Hawaii follows the American Bar Association (ABA) Model Code regarding competitive sealed bidding.

A 2018 Survey Summary by the National Association of State Procurement Officials (NASPO) reported that NASPO supports implementing the 2000 American Bar Association (ABA) Model Procurement Code’s provisions into state procurement laws. *“Sixty percent of the jurisdictions responding to the survey indicated that they have adopted the provisions of the Model Code partially or in its entirety. Of these states, the majority implemented all provisions of the 2000 ABA Model Code, or modeled their procurement codes after it.”*

According to a University of Wisconsin 2019 report on procurement *“To date, more than 16 states use the ABA Model Code in its entirety with thousands of other local governments incorporating parts of the code into their practices. ABA Model Code is generally regarded as a model code that reflects the diversity of state and local governments, and not a uniform code that can be ubiquitously adopted in full by all municipalities.”*

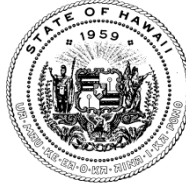
Additionally, the ABA 2007 Model Code for Public Infrastructure Procurement in design-bid-build projects identifies the competitive sealed bidding process as the appropriate method for the construction phase, where the award is to the lowest responsible and responsive bidder, whose bid meets all the requirements.

Act 188, SLH 2021, amended HRS §103D-302, Competitive sealed bidding, (f) by requiring procurement officers to also consider past performance, if available, as part of the criteria that will affect the bid price and be considered in evaluation for award. The SPO is currently working on a past performance database and administrative rules to enforce this Act.

The SPO opposes the language of SB2335, SD1, in its entirety, as it does not address why a competitive sealed bidding award should be made to the bid closest to the median of all bids submitted. An agency selects the procurement method they will utilize and releases their solicitation notifying vendors how the contract will be awarded. The SPO would question why an agency would choose a median-award process, which would require them to choose the median bidder, rather than award to the responsible and responsive low bidder, especially when there are budget constraints. In addition, there may be unintended consequences. For instance, vendors may collude to have more predictable outcomes, or vendors may not submit their best offers, resulting in higher costs for the State.

Each year new procurement laws are applied to state agencies causing state agency contracts to become more complex and costly. It is difficult to justify a new method of procurement titled, “Competitive sealed bidding; median bid method” to award to the bid closest to the median of all bids submitted.

Thank you



LATE

TESTIMONY BY:

JADE T. BUTAY
DIRECTOR

Deputy Directors
ROSS M. HIGASHI
EDUARDO P. MANGLALLAN
PATRICK H. MCCAIN
EDWIN H. SNIFFEN

**STATE OF HAWAII
DEPARTMENT OF TRANSPORTATION**
869 PUNCHBOWL STREET
HONOLULU, HAWAII 96813-5097

February 22, 2022
10:00 A.M.
State Capitol, Teleconference

**S.B. 2335, S.D. 1
RELATING TO PROCUREMENT**

Senate Committee on Ways and Means

The Department of Transportation (DOT), **supports** this bill that proposes to allow procuring agencies to use the median bid method of procurement.

The DOT proposes for agency to elect use of the median bid as an allowable method under the competitive sealed bidding method of procurement.

The DOT provides the following proposed language.

Section 103D-302.5, Competitive sealed bidding; median bid method. The procuring agency may elect to use the median bid method of procurement when the head of the purchasing agency determines in writing that the median bid method of competitive sealed bidding is advantageous and in the best interest of the state.

Define "median bid" in Section 103D-104 Definitions

"Median bid" means the middle bid price among all bid proposal submissions, or, if there are an even number of bids, the average of the middle two numbers.

Proposed revision to Hawaii Revised Statutes (HRS) 103D-302 incorporating requirements under new Section 103D-302.5:

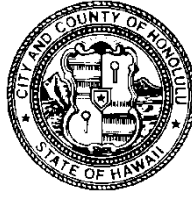
(h) The contract shall be awarded with reasonable promptness by written notice to the lowest responsible and responsive bidder whose bid meets the requirements and criteria set forth in the invitation for bids, unless the procurement was made under Section 302.5 of this chapter, in which the contract shall be awarded with reasonable promptness by written notice to the responsible and responsive median bidder. In the event all bids exceed available funds as certified by the appropriate fiscal officer, the head of the purchasing agency responsible for the procurement in question is authorized in situations where time or economic considerations preclude re-solicitation of work of a reduced scope to negotiate an adjustment of the bid price, including

changes in the bid requirements, with the low responsible and responsive bidder, or with the responsible and responsive median bidder as the case may be in order to bring the bid within the amount of available funds.

The Hawaii Administrative Rules § 3-122 may be revised to develop rules providing for the requirements and procedures in implementing the median bid method of competitive sealed bidding. In general, the process should follow requirements under competitive sealed bidding provisions except with award not to the lowest responsive responsible bidder and instead to the responsive and responsible median bidder. The competitive sealed bid in HRS 103D-302 should be the default method and HRS 103D-302.5, median bid should be an allowable exception should the head of the purchasing agency determine in writing that is advantageous and in the best interest of the state to use.

Thank you for the opportunity to provide testimony.

RICK BLANGIARDI
MAYOR



ANDREW T. KAWANO
DIRECTOR

CARRIE CASTLE
DEPUTY DIRECTOR

TESTIMONY OF ANDREW T. KAWANO
DIRECTOR OF BUDGET AND FISCAL SERVICES
CITY AND COUNTY OF HONOLULU
BEFORE THE SENATE COMMITTEE ON WAYS AND MEANS
February 22, 2022, 10:00 AM, Conference Room 211 and Videoconference

TO: The Honorable Donovan M. Dela Cruz, Chair
and Members of the Senate Committee on Ways and Means

RE: OPPOSITION OF SENATE BILL 2335, SD1, RELATING TO PROCUREMENT

The Department of Budget and Fiscal Services, City and County of Honolulu (City), **opposes** Senate Bill (SB) 2335, SD1, Relating to Procurement.

The bill does not provide enough information as to why the median bid method is being proposed. The proposed procurement method is unclear, will lead to more protests and increased time and costs to the City. Furthermore, all rights and remedies are available to a contracted party, regardless of the procurement method.

If other factors need to be considered where the competitive sealed bidding method pursuant to HRS 103D-302 is not sufficient, the competitive sealed proposals method pursuant to HRS 103D-303 is available and includes the evaluation of past performance, price, and other factors as stated in the solicitation. The competitive sealed proposals method also includes the possibility of conducting discussions with offerors to better understand an offeror's proposal.

For the reasons stated above, the City respectfully opposes Senate Bill 2335, SD1.

Mahalo for the opportunity to testify on this bill. Should you have any questions or concerns, please feel free to contact the Department of Budget & Fiscal Services' Division of Purchasing at 808-768-5535 or bfspurchasing@honolulu.gov.